

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

THEODORE GLENN BROOKS,)	
)	
Petitioner,)	
)	1:08CV277
v.)	1:00CR293-6
)	
UNITED STATES OF AMERICA,)	
)	
Respondent.)	

ORDER

The Recommendation of the United States Magistrate Judge was filed with the court in accordance with 28 U.S.C. § 636(b) (Doc. 234) and, on October 31, 2008, was served on the parties in this action (Doc. 235). Petitioner objected to the Recommendation within the time limit set forth in the statute. (Doc. 237.)

The court has appropriately reviewed the portions of the Magistrate Judge's Recommendation to which objection was made and has made a de novo determination. The court's conclusion is in accord with the Magistrate Judge's Recommendation, which is therefore adopted. In so holding, the court notes that in his objection Petitioner makes the following argument under the rubric of equitable tolling: "Mr. Brooks believe that his attorney who did not respond to his calls or letters after the first two years Mr. Brooks may inquiries during them first two years to his attorney 'why' counsel didn't pursue his direct appeal on his behalf." (Doc. 237 at 4.) Petitioner concedes that he made inquiries to his counsel within two years of his conviction, which was at least five years ago, about "'why' counsel didn't pursue his

direct appeal," thus putting him on notice of any potential claim well outside the one-year statute of limitations under 28 U.S.C. § 2255(f). Even assuming the merit of his claim, therefore, Petitioner's failure to act for the past five years renders it untimely. There being no disputed issue of fact requiring an evidentiary hearing, the action should be dismissed. 28 U.S.C. § 2255(b); Raines v. United States, 423 F.2d 526, 529-31 (4th Cir. 1970); Stevenson v. United States, No. 1:06cv92, 2009 U.S. Dist. LEXIS 3090, at *7 (N.D. W. Va. Jan. 16, 2009) (holding that "[a]n evidentiary hearing is not required where the case file and documents are adequate to dispose of the matter" (internal quotation marks and citation omitted)); cf. United States v. Witherspoon, 231 F.3d 923, 925-27 (4th Cir. 2000).

IT IS THEREFORE ORDERED that Respondent's motion to dismiss this action for being filed beyond the one-year limitation period (Doc. 229) be GRANTED, that Petitioner's motion to vacate, set aside or correct sentence (Doc. 225) be DENIED, and that this action be DISMISSED WITH PREJUDICE. A Judgment dismissing this action will be entered contemporaneously with this Order. Finding no substantial issue for appeal concerning the denial of a constitutional right affecting the conviction, nor a debatable procedural ruling, a certificate of appealability is not issued.

/s/ Thomas D. Schroeder
United States District Judge

February 3, 2009